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No. 95-53

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

COLUMBIA GULF TRANSMISSION COMPANY,

Petitioner,

versus

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the decision of the Supreme Court of Louisiana in this case, *Columbia Gulf Transmission Co. v. Broussard*, 653 So.2d 522 (La. 1995), consistent with this Court's holding in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, *reh. den.*, 430 U.S. 976 (1977), and *McNamara v. D. H. Holmes Co., Ltd.*, 505 So.2d 102, *aff'd sub nom. D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988)?

PARTIES

The Petitioner's listing of the parties is correct.

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No. 95-53

In The

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COLUMBIA GULF TRANSMISSION COMPANY,

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RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA [hereinafter the "Department"], respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking relief of the Supreme Court of

Louisiana's Opinion in this case. That Opinion is reported at 653 So.2d 522 (La. 1995).[1]

CONSTITUTIONAL PROVISION

Constitutional:

Article 1, § 8, Cl. 3. Powers of Congress. The Congress shall have power . . .

(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

STATEMENT OF THE CASE

The facts, as stated by Petitioner, COLUMBIA GULF TRANSMISSION COMPANY [hereinafter "Columbia Gulf"], are substantially correct.

---

[1] The Supreme Court of Louisiana reversed a Summary Judgment in favor of Columbia Gulf Transmission Company and remanded the case to the Louisiana trial court for further proceedings. *Columbia Gulf Transmission Co. v. Broussard*, 653 So.2d 522, 525 (La. 1995). No action has, as yet, taken place in the Louisiana trial court; however, the federal issue presented here is conclusive, and the outcome of further proceedings is preordained because the Louisiana state case is, for all practical purposes, concluded. The Judgment of the Supreme Court of Louisiana on the federal issue should be deemed final. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975).

Issue was joined on the singular allegation that:

> The sales/use taxes herein protested were imposed upon compressor fuel utilized to transport natural gas in continuous flow in interstate commerce and is an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3.

Columbia Gulf's Original Petition Paragraph 5.

No Louisiana statutes were initially drawn in question except Columbia Gulf's right under LA. R.S. 47:1576 to pay Columbia Gulf's taxes under protest, which right was certainly not contested by the State of Louisiana. Louisiana's procedure in this regard has been affirmatively approved by this Court in *Great Lakes Dredge & Dock Company v. Huffman*, 319 U.S. 203 (1943).

The Louisiana trial court granted a Motion for Summary Judgment.[2] Since the Louisiana trial court failed to give written reasons for its granting of a Summary Judgment, the issue as presented, by the Department, to the Louisiana intermediate appellate court was:

---

[2] Columbia Gulf has stated in its Petition, Page 5, that no written reasons were assigned; however, there were Oral Reasons for Judgment in the Record.

BY THE COURT:

> THE EASIEST THING TO DO TO LOOK LIKE THE GOOD GUY IS TO SAY DENIED BECAUSE THE STATE OF LOUISIANA NEEDS 1.8 MILLION DOLLARS, AND I'M WELL AWARE OF THAT. AND I COULD LET THE COURT OF APPEALS BE THE BAD GUYS. BUT THAT'S NOT WHAT I'M PAID TO DO. I'M PAID TO TAKE THE HEAT, AND I'M GOING TO. YOUR MOTION IS GRANTED.

> Whether the provisions of the Louisiana sales/use tax law, LA. R.S. 47:302 are violative of the Commerce Clause Article 1, Section 8, Clause 3 of the Constitution of the United States, as applied by assessing a sales/use tax against appellee, COLUMBIA GULF TRANSMISSION COMPANY, on the natural gas used by COLUMBIA GULF TRANSMISSION COMPANY and consumed as fuel in the four compressors owned by COLUMBIA GULF TRANSMISSION COMPANY and located within the State of Louisiana.

On appeal, the Louisiana intermediate appellate court concluded that the compressor fuel, as consumed in the re-compressing process, never comes to rest under Louisiana law and, therefore, is not subject to taxation. While so holding, the Louisiana intermediate appellate court failed to address the federal constitutional issues.

> Because we agree that Louisiana may not statutorily impose a use tax on the gas at issue, we need not address the parties' constitutional arguments.

Columbia Gulf Transmission Company v. Broussard, 637 So.2d 733, 735 (La. Ct. App. 1 Cir. 1994).

The Supreme Court of Louisiana granted a Writ of Certiorari to consider a possible conflict with *McNamara v. D. H. Holmes Co., Ltd.*, 505 So.2d 102, *aff'd sub nom. D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988). The Supreme Court of Louisiana determined that: (i) a taxable incident occurred upon the consumption of the compressor gas, (ii) *Helson v. Commonwealth of Kentucky*, 279 U.S. 245 (1929) had been superseded by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, *reh. den.*, 430 U.S. 976

(1977), and (iii) the four-prong *Complete Auto* test had been successfully satisfied. *Columbia Gulf Transmission Co. v. Broussard*, 653 So.2d at 524 (La. 1995).

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1.

The Levy Of Louisiana's Sales/Use Tax On Compressor Fuel Is Not Violative Of The Commerce Clause Because The Four-Prong Test of *Complete Auto* Has Been Satisfied In These Proceedings In That It:

(i) Is applied to activity having a substantial nexus with the state –

Columbia Gulf has hundreds of miles of pipeline traversing the State of Louisiana from east to west, west to east, and south to northwest. Along this pipeline there exists four compressor stations. Columbia Gulf does sufficient business within Louisiana that it must pay Louisiana Sales Tax, Louisiana Corporate Income Tax, Louisiana Unemployment Tax and Louisiana Ad Valorem Property Tax. In concluding that this prong of the test had been met, the Supreme Court of Louisiana held:

> Columbia's gas production has a substantial nexus with the State of Louisiana. Columbia's pipeline and four compressor stations carry natural gas from offshore Louisiana to the state's borders. Columbia pays Louisiana taxes on its employees and activity in the state.

653 So.2d at 524.

(ii) does not discriminate against interstate commerce –

The Louisiana sales/use tax is evenly applied as between intrastate pipelines and interstate pipelines which fuel their compressors with natural gas. These are tax neutral. In concluding that this prong of the test had been met, the Supreme Court of Louisiana held:

> There is no discrimination against interstate commerce. The tax is applied equally to intrastate and interstate pipelines. Gas in interstate commerce is taxed equally with intrastate gas when both are consumed within the state.

653 So.2d at 524.

(iii) is fairly apportioned –

The sales/use tax imposed is based only on gas actually consumed in the compressor stations located in Louisiana. The amount of natural gas used as fuel for the compressors is a known quantity. Its measurement is reflected in the amount of sales/use tax which has been escrowed under protest pursuant to LA. R.S. 47:1576. Since the natural gas is measured when it is removed for fuel and consumed, no other state can seek to tax this natural gas consumed by the compressor stations located in Louisiana. Even if another State attempted to tax such gas, which does not occur, a credit would be allowed. LA. R.S. 47:302(A)(2), 47:321(A)(2). In concluding that this prong of the test had been met, the Supreme Court of Louisiana held:

> This tax is fairly apportioned because it is imposed only on gas actually consumed in Louisiana's compressor stations.

653 So.2d at 524.

(iv) is fairly related to benefits that the State provides –

By paying Louisiana Unemployment Tax, Columbia Gulf has employees who enjoy the benefits provided in Louisiana of roads, schools, fire and police protection, and all of the other advantages of a civilized society. Significantly, Columbia Gulf has what few corporations share, the right to take from Louisiana's persons, by way of expropriation, the private property of such persons. *See* LA. R.S. 19:2, LA. R.S. 45:251 and *Dixie Pipeline Company v. Barry*, 227 So.2d 1 (La. App. 3 Cir. 1969), *writ refused*, 229 So.2d 731 (La. 1970). Columbia Gulf has exercised this right with some degree of regularity. *See Shepard's Louisiana Case Names Citator*, Second Edition 1992, Part 1. In concluding that this prong of the test had been met, the Supreme Court of Louisiana held:

> The gas is measured as it is removed and consumed. No other state can tax the same gas. The tax is fairly related to benefits provided by Louisiana. Columbia's employees enjoy Louisiana's roads, schools, fire and police protection. Columbia has the right to expropriate Louisiana private property. LSA-R.S. 19:2(5). Columbia's compressor fuel is fairly taxed because of the company's "significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business." *D. H. Holmes*

Co., Ltd. v. McNamara, 486 U.S. 24, 33, 108 S.Ct. 1619, 1624, 100 L.Ed.2d 21, 29 (1988).

653 So.2d at 524.

A long line of cases decided since *Complete Auto* has recognized that the four factors identified in *Complete Auto* constitute the proper test for determining whether a state tax on intrastate commercial activities violates the Commerce Clause's prohibition on the States' interference with the free flow of interstate trade. *See e.g., Oklahoma Tax Commission v. Jefferson Lines*, ___ U.S. ___, 131 L.Ed.2d 261, 115 S.Ct. 1331 (1995); *Goldberg v. Sweet*, 488 U.S. 252 (1989); *D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Washington Rev. Dept. v. Stevedoring Assn.*, 435 U.S. 734 (1978).

2.

"[This Court] should not adhere to a decision, however right it was at the time, that by reason of later cases and economic reality can no longer be rationally justified." *Quill Corporation v. North Dakota*, 504 U.S. ___, 119 L.Ed.2d 91, 120, 112 S.Ct. 1904, 1922, (1992) (White, J., concurring in part and dissenting in part)

The prominent authors who have considered the question are uniformly of the opinion that the case of *Helson v. Commonwealth of Kentucky*, 279 U.S. 245 (1929),

has, in the words of the Supreme Court of Louisiana, been superseded by *Complete Auto.*

> The commerce clause obstruction to state taxation erected in *Helson* apparently has been removed by *Complete Auto Transit, Inc. v. Brady. Helson* condemned the use tax there imposed on the consumption of gasoline to provide motive power for a vehicle by which interstate commerce was carried on in the taxing State. Taxpayer operated a ferry boat engaged in interstate commerce within the taxing State. The tax was constitutionally stigmatized as the "price of the privilege of using an instrumentality of interstate commerce." Under *Auto Transit,* a tax imposed upon the privilege of engaging in interstate commerce is no longer *per se* invalid. Additionally, the four *Auto Transit* safeguards that must be satisfied before interstate commerce can be taxed all appear to be met in *Helson.* First, there is the *Auto Transit* requirement that there must be a sufficient nexus of the taxing State with the activity taxed. The *Helson* tax is not wanting in this requirement. Seventy-five per cent of the distance traveled by the *Helson* interstate ferry was within the taxing State, and the tax was measured only by the amount of the gasoline consumed within the State. Thus, satisfied, too, is the second *Auto Transit* standard, which requires that the tax be fairly apportioned. In *Helson,* the State imposed the tax only on that part of the gasoline consumed by the ferry boat operating within the State. A fairer apportionment is difficult to imagine. Neither did *Helson* violate the *Auto Transit* standard that the tax must not discriminate against interstate commerce. There is no evidence of such discrimination in *Helson. Auto*

> *Transit* also requires that the taxed activity be fairly related to the services provided by the taxing State. In *Helson*, the State only taxed that gasoline consumed by the ferry boat operating within the taxing State, which provided benefits and protection to the ferry boat operating within her borders.
>
> It is doubtful that *Helson* any longer has any vitality as a legal precedent.

Hartman, Paul J., *Federal Limitations on State and Local Taxation*, § 10:5 Sales and Use Taxes, pp. 602-603 (1981).

Robert C. Brown was a Professor of Law at Indiana University when he authored *The Future of Use Taxes*. Professor Brown's discussion concerning *Helson* is entitled "The Doctrine of The *Helson* Case."

> The Doctrine of the *Helson* case
>
> Apart from possible indirect effects of the use tax upon interstate commerce, which will be hereafter considered, the most serious judicial limitation of the use tax is embodied in the decision of the Federal Supreme Court in *Helson v. Kentucky*. Here a Kentucky sales tax had been construed by the courts of that state as a use tax where the purchase was made outside the state. The *Helson* case held the tax unconstitutional as a direct burden on interstate commerce when applied to gasoline purchased in Illinois and used for the operation of an interstate ferry (from Illinois to Kentucky), and though concededly 75 per cent of the gasoline was actually used in Kentucky.

This decision, twelve years old and consequently rather ancient as such matters go, is on principle perhaps justifiable on the ground of lack of proper apportionment, though the opinion of the Court, written by Mr. Justice Sutherland, does not make any point of this. It was substantially a five to four decision, since Mr. Justice Stone (Justices Holmes and Brandeis concurring with him) agreed under protest, and only because of prior decisions of the Court. Curiously enough, the one complete dissenter was Mr. Justice McReynolds, who, however, wrote no opinion.

The *Helson* case, if still a binding authority, is a rather serious check upon use taxes with respect to actual facilities of interstate commerce. Its doctrine is still followed to the extent that a strict use tax with respect to gasoline or other commodity actually used as a facility of interstate commerce must be reasonably apportioned to the actual use in the state. But otherwise the authority of the *Helson* case is today very doubtful. It is clear, for instance, that the doctrine of the case does not apply where the article taxed is used wholly within the state, even though imported from outside. Neither does it apply where gasoline is purchased in the state even though it is used wholly in operating airplanes in interstate commerce, and this despite the fact that here there is no use of the roads to justify the tax on that basis.

The loophole opened by the last-cited case was soon enlarged by two other decisions. In the first of these, a Tennessee tax on the storage of gasoline within the state was upheld, even though the taxpayer was an interstate railroad

and so would not use the roads on which this revenue was applied, and even though substantially all the gasoline would be used in interstate commerce. The Court distinguished the *Helson* case on its facts, but showed obvious disapproval of it. A similar doctrine was applied in the other case, which involved air transportation, the state tax on the storage of gasoline being upheld even though the gasoline was bought outside the state. The *Helson* case was distinguished in that here the tax was on storage within the state and not on interstate flying. It seems that this distinction, while perhaps technically justifiable, is practicably unsubstantial.

The Supreme Court itself has recognized that there is little left of the *Helson* case; that the distinctions which it has thus made are so narrow as to be almost nonexistent. It thus seems that the opinion expressed by a number of commentators, that the *Helson* case is substantially overruled, is correct. At least it is no longer a substantial restriction upon the taxing power of the states. Furthermore, the old doctrine, or whatever is left of it, has no effect whatsoever upon the much more important application of the use tax to goods within the state for other purposes than as a facility of commerce. Obviously such use has no direct effect upon interstate commerce, though, as will presently appear, there may be indirect effects which have to be considered. The point is that the *Helson* doctrine is substantially out, and needs no further consideration.

Brown, Robert, *The Future of Use Taxes* , 8 *Law and Contemporary Problems* pp. 495, 496 (1941).

The two volume treatise on state taxation by Jerome R. Hellerstein and his son, Walter Hellerstein covers, in Volume I Corporate Income and Franchise Taxes, and in Volume II Sales and Use, Personal Income, Death and Gift Taxes. Their discussion concerning the *Helson* case states:

> Use Tax on Goods Allegedly in Stream of Interstate Commerce
>
> In *DH Holmes Co. v. McNamara,* [Footnote 245: DH Holmes Co. v. McNamara, 486 U.S.24, 108 S.Ct. 1619 (1988)] the Supreme Court considered the question of whether the Commerce Clause forbade Louisiana from imposing a use tax on catalogs shipped from outside the State directly to the taxpayer's customers in Louisiana. The taxpayer, Holmes, was a Louisiana corporation with thirteen department stores and approximately 1,500,000 customers throughout the State. Holmes argued that Louisiana could not impose the tax on Holmes' use of the catalogs because they were still in the stream of commerce when the tax attached. The Supreme Court found that this contention was beside the point. Declaring that it had abandoned the "abstract notion that interstate commerce 'itself' cannot be taxed by the States" in *Complete Auto Transit, Inc. v. Brady,* the court held:
>
> > Accordingly, in the present case it really makes little difference for Commerce Clause purposes whether appellant's catalogs "came to rest" in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some

> importance for other purposes (in determining, for instance, whether a "taxable moment" has occurred [under State law]), but for Commerce Clause analysis it is largely irrelevant. [Footnote 248: DH Holmes Co. v. McNamara, supra note 245, 486 US at 31, 108 S.Ct. at 1623. . . . The *DH Holmes* case is considered in more detail in ¶ 16.03[3][a][ii]. See also Pledger v. Arkla, Inc. 309 Ark. 10, 827 SW2d 126 (1992)) [*cert. denied*, ___ US ___, 113 S.Ct. 203 (1992) 1993 Supplement], Tennessee Gas Pipeline Co. v. Marx, 594 So.2d 615 (Miss. 1992, and Questar Pipeline Co. v. Utah State Tax Comm'n, 817 P2d 316 (Utah 1991), all of which relied on the *D.H. Holmes* case in sustaining State use taxes on compressor fuel used to propel natural gas through interstate pipelines. In light of *D.H. Holmes*, and the cases construing it, one may question the continuing validity of Helson & Randolph v. Kentucky, 279 US 245, 49 S.Ct. 279 (1929), which held that a tax on the mere consumption of fuel in the State by an instrumentality of interstate commerce violated the Commerce Clause because there was no "taxable moment." Cf. United Air Lines, Inc. v. Mahin, 410 US 623, 93 S.Ct. 1186 (1973) (sustaining State tax on storage of fuel consumed on interstate flights and narrowly distinguishing *Helson & Randolph*).]

Hellerstein and Hellerstein, *State Taxation*, ¶ 4.11[1] pp.4.60-4.61 (1992).

Hellerstein and Hellerstein also discussed the *Helson* case in ¶ 18.04[1] of their treatise:

> In the other case cited in the *United Air Lines*[3] case, Helson v. Commonwealth of Ky., 279 US 245, 49 S.Ct. 279 (1929), a Kentucky tax on gasoline loaded onto a ferry in Illinois and consumed in the course of the ferry's trip to Kentucky, was invalidated. The court distinguished *Helson* in the later *Edelman* case on the ground that the taxable event in *Helson* was the consumption of the fuel, not the storage. Storage in the taxing State was found to be the taxable event in *Edelman* in which the levy was upheld. This is a very narrow distinction that is by no means free from doubt. Fortunately, such nice distinctions are no longer decisive in Commerce Clause adjudication since the *Complete Auto Transit* decision. See supra note 57 [[57] Complete Auto Transit, Inc. v. Brady, 430 US 274, 97 S.Ct. 1076 (1977)].

Hellerstein and Hellerstein, *State Taxation*, ¶ 18.04[1] pp. 18.15-18.16, fn. 67 (1992).

> Decisions such as *United Air Lines* that sustained State use taxes under the traditional Commerce Clause doctrine remain good law, but the supporting rhetoric has changed. Although some State courts have been lamentably slow to adapt their decisions to the Supreme Court's current Commerce Clause views, [Footnote 71 . . . The Wisconsin Supreme Court in 1978 struck down a sales and use tax on natural gas used in pumping facilities of an interstate pipeline. The pumps in question were located entirely in the State, and the natural gas was consumed at two compressor stations in the

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[3] *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973).

> State. Midwestern Gas Transmission Co. v. Wisconsin Dep't of Revenue, 84 Wis. 2d 261, 267 NW2d 253 (1978). The court relied on the 1929 decision in Helson & Randolph v. Kentucky, 279 US 245, 49 S.Ct. 279 (1929), in which a Kentucky tax on a ferry boat's use of gasoline, only 75 percent of which was consumed in the State, was struck down under the Commerce Clause. Although the Wisconsin court discussed both the *United Air Lines* (supra note 66) and *Complete Auto Transit* (supra note 57) cases, it concluded – it is believed erroneously – that the Wisconsin tax had not been validated by those cases. . . . Unfortunately, some commentators have also failed to accommodate their writing to the current Supreme Court decision. See Tatarowicz & Swails, "Avoiding Use Tax on Interstate Transportation Equipment," 3 Interstate Tax Rep. Vol. 12, at 1 (1984), in which the intrastate "taxable moment" test is treated as the prevailing Commerce Clause doctrine; Nackenson-Sheiber, "States Narrow Exemption for Instrumentalities of Interstate Commerce," 7 Interstate Tax Rep. No. 1 (1988). For other writings analyzing the recent Supreme Court decisions, see Kaufman and the author W. Hellerstein's, "Sales and Use Taxation of Movable Property in Interstate Commerce," 1981 NTA-TIAA Procs. 69, 71; Dane, "Movable Property in Interstate Commerce: How It Is Subject to Sales and Use Taxes," 48 J. of Tax'n 176 (Mar. 1978); . . .] the courts need no longer search for an intrastate taxable incident that is distinct from interstate commerce in order to uphold a tax under the Commerce Clause.

Hellerstein and Hellerstein, *State Taxation*, ¶ 18.04[1] p. 18.17, fn. 71 (1992).

3.

Every state court case pertaining to the sales/use taxation of compressor fuel since *Complete Auto* has been decided on the basis of *Complete Auto*'s four prong test.

This is the fifth state court case since *Complete Auto* concerning the same issue, i.e., a tax levied on compressor fuel. In each instance, the respective state Supreme Courts decided their case by the application of the four prong *Complete Auto* test.

The first of these five cases, *Midwestern Gas Transmission Company v. Wisconsin Department of Revenue*, 267 N.W.2d 253 (Wis. 1978), after discussing the four prong criteria of *Complete Auto*, concluded that the first point "nexus" was absent, based upon the continuing relevence of *Helson*. This Court denied certiorari in the *Midwestern* case, 439 U.S. 997 (1978).

Although the taxpayer won the first post *Complete Auto* compressor fuel case, the taxpayer lost the next three state compressor fuel cases. *Questar Pipeline Company v. Utah State Tax Commission*, 817 P.2d 316 (Utah 1991), *Tennessee Gas Pipeline Co. v. Marx*, 594 So.2d 615 (Miss. 1992), and *Pledger v. Arkla*, 827 S.W.2d 126 (1992). A Petition for Certiorari in the last case was denied. *Arkla, Inc. v. Pledger*, ___ U.S. ___, 121 L.Ed.2d 144, 113 S.Ct. 203 (1992).

Each of these three cases was decided by the application of the four prong test of *Complete Auto*, coupled with the *D. H. Holmes* holding by this Court that "[a]ccordingly, in the present case it really makes little difference for Commerce Clause purposes whether appellant's catalogs "came to rest" in the mailboxes of its Louisiana

customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some importance for other purposes (in determining, for instance, whether a "taxable moment" has occurred [under State law]), but for Commerce Clause analysis it is largely irrelevant."

The present case is the last of the five state cases since *Complete Auto*. **The Reasons For Granting The Writ** as set forth at Pages 3 to Page 19 of the Petition as filed in this case are precisely the same as set forth in the *Arkla* petition at pages 6 to 20.[4] Every argument advanced in this petition has heretofore been entertained and considered three years ago by this Court in the *Arkla* case. A parallel presentation of the relevant portion of the present case and the *Arkla* case is set forth in the Appendix to this Opposition.

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[4] With, however, the singular exception of a citation at Page 18 of the petition here to the *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. ___, 131 L.Ed.2d 261, 115 S.Ct. 1331 (1995) case and a section at pages 21-27 of the *Arkla* petition concerning the *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) case.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari as filed by Columbia Gulf Transmission Company should be denied.

All of the above and foregoing is thus respectfully submitted.

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APPENDIX

As shown in the Appendix, this Court has heretofore entertained, considered and rejected a *Petition for a Writ of Certiorari to the Supreme Court of Arkansas* containing the same issues and, for all intents and purposes, virtually the same wording as presented in this petition. The Arkansas petition, as filed, is entitled *Arkla, Inc., Petitioner v. James C. Pledger, Director, Department of Finance and Administration, State of Arkansas, Respondent*, No. 92-218 in the Supreme Court of the United States October Term, 1992. The writ was denied on October 5, 1992, *Arkla, Inc. v. Pledger*, 121 L.Ed.2d 144, 113 S.Ct. 203, 61 U.S.L.W. 3218 (1992).

The following Appendix pages demonstrate that the petitions are almost indistinguishable. The Appendix pages place the present case on the left side while the *Arkla* case is placed on the right side. [The footnotes and the page numbers are, however, omitted.]

Columbia Gulf No. 95-53

REASONS FOR GRANTING THE WRIT

This case presents the ultimate attempt by a state to impose its use tax in violation of the provisions of the Commerce Clause of the United States Constitution. In this proceeding, a portion of a natural gas stream which is clearly being transported in interstate commerce is consumed, without ever coming to rest in Louisiana, in order to provide the energy necessary to move the remainder of the commingled natural gas stream onward in its uninterrupted interstate journey. The State of Louisiana, by executive fiat and now with the approval of its Supreme Court, has imposed its use tax directly upon the value of that portion of the natural gas stream so consumed. This Court has never authorized nor permitted the imposition of a use tax directly upon the value of the commodity which, at the moment of the taxable event, is being transported and moved in interstate commerce. In all such taxing schemes approved by this Court, the article which is to be subjected to the sale or use tax has become a part of the mass of the physical property of the taxing state.

Arkla No. 92-218

REASONS FOR GRANTING THE WRIT

This case presents the ultimate attempt by a state to impose its sales tax in violation of the provisions of the Commerce Clause of the United States Constitution. In this proceeding, natural gas which is clearly being transported in interstate commerce (and which is generally purchased out-of-state) is consumed wholly within that stream of interstate commerce (before it ever comes to rest in Arkansas) to provide energy to drive the movement of the remaining natural gas in interstate commerce. The State of Arkansas, with the approval of its Supreme Court, has imposed a sales tax directly upon the value of the natural gas consumed within that stream of interstate commerce. This Court has never authorized nor permitted the imposition of a sales tax, or even a use tax, directly upon the value of the commodity which, at the moment of the taxable event, is being transported and moved in interstate commerce. In all such taxing schemes approved by this Court, the article which is to be subjected to the sales or use tax has become a part of the mass of the physical properties of the imposing state.

This Court held in *Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), that a state could not impose its use tax directly upon the value of the fuel consumed in an instrumentality of interstate commerce. The prohibition established by this Court in *Helson* has never been overruled. The majority opinion of the Supreme Court of Louisiana failed to follow this principle; indeed, that court mistakenly referred to *Helson* as having been "superseded."

There is also a direct conflict among the highest appellate courts of a number of states on this important federal issue concerning the imposition of a state use tax directly upon fuel consumed in the stream of interstate commerce. While the decision of the Supreme Court of Louisiana below is in accord with recent decisions of the highest courts of Arkansas,[5] Mississippi[6] and Utah,[7] it is diametrically opposed to decisions of the highest courts of Wisconsin[8] and Tennessee[9] on virtually identical facts. The Arkansas, Mississippi and Utah Supreme Courts, and now that of Louisiana, totally disregarded this Court's decision in *Helson*, while the Tennessee and Wisconsin Supreme Courts held that the rule of *Helson* was the controlling law in this factual situation.

Arkla No. 92-218

This Court held in *Helson & Randolph v. Kentucky*, 279 U.S. 245, 73 L.Ed. 683, 49 S.Ct. 279 (1929), that a state could not impose its use tax directly upon the value of the fuel consumed in an instrumentality of interstate commerce. This **bright-line** rule established by this Court in *Helson* has never been overruled, and the Petitioner submits it is the controlling law, under the Commerce Clause, on the issue presented. The Arkansas Supreme Court's majority opinion failed to even recognize, or discuss, the *Helson* case, even though the Petitioner fully briefed this issue, and made it the main subject of its petition for rehearing, in the court below.

There is also a direct conflict among the highest appellate courts of a number of states on this important federal issue concerning the imposition of a state excise tax directly upon articles while in the flow of interstate commerce. While the decision of the Arkansas Supreme Court below is in accord with the very recent decisions of the Supreme Courts of Mississippi[3] and Utah,[4] it is diametrically opposed to the long-standing decisions of the Supreme Courts of Wisconsin[5] and Tennessee[6] on virtually identical facts. The Arkansas, Mississippi and Utah Supreme Courts totally ignored this Court's decision in *Helson*, while the Tennessee and Wisconsin Supreme Courts held that the bright-line rule of *Helson* was the controlling law in this factual situation.

* * *

[There follows discussion on both the cases of *Helson & Randolph v. Kentucky*, 279 U.S. 577 (1929) and *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944)]

Thus, this case presents important federal constitutional issues affecting interstate commerce upon which there is a conflict of opinion between decisions of this Court and the Supreme Court of Louisiana, and between the highest courts of several states. These conflicts can only be resolved by this Court. The constitutional issues underpinning the ultimate resolution of this case, which can only be resolved by this Court and for which this Court should grant this writ, are:

1. **Conflicting Decisions.** Are the decisions of the Supreme Courts of Wisconsin and Tennessee correct in their determination that state excise taxes, as are imposed in this case, are in violation of the Commerce Clause of the United States Constitution, or are the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, and now Louisiana, correct in holding that the imposition of such excise taxes do not violate the Commerce Clause? (Addressed in Section A below.)

2. **Controlling Decision.** Has the decision in *Helson,* which was subsequently cited with approval by this Court in 1973 and 1981, been superseded by the decision in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326, *reh. den.*, 430 U.S. 976, 97 S. Ct. 1669, 52 L. Ed. 2d 371 (1977), such that *Helson* is no longer the controlling authority on this issue? (Addressed in Section B below.)

Thus, this case presents important federal constitutional issues affecting interstate commerce upon which there is a conflict of opinion between decisions of this Court and the Arkansas Supreme Court, and between the Supreme Courts of the states. These conflicts can only be resolved by this Court. This case also presents a growing controversy between the states and the operators of interstate pipelines. This constitutional issue is obviously of extreme importance to the industry as well as the states, as reflected by the fact that three decisions of state supreme courts have been rendered within the last year regarding the taxation of such compressor fuel.[7] The constitutional issues underpinning the ultimate resolution of this case, which can only be resolved by this Court and for which this Court should grant this writ, are:

1. **Conflicting Decisions.** Are the decisions of the Supreme Courts of Wisconsin and Tennessee correct in their determination that state excise taxes, as are imposed in this case, are in violation of the Commerce Clause of the United States Constitution, or are the decisions of the Supreme Courts of Arkansas, Mississippi and Utah correct in holding that the imposition of such excise taxes do not violate the Commerce Clause? [Addressed in Section I, A., below.]

2. **Controlling Decision.** Has the decision in *Helson*, which was subsequently cited with approval by this Court in 1973 and 1981, been overruled or modified by the decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed. 326, 97 S.Ct. 1076 (1977), such that *Helson* is no longer the controlling authority on this issue? [Addressed in Section I, B., below.]

Columbia Gulf No. 95-53

LOUISIANA CANNOT IMPOSE ITS USE TAX DIRECTLY UPON AN ARTICLE WHICH IS CONSUMED WHILE IN THE FLOW OF INTERSTATE COMMERCE, WITHOUT EVER COMING TO REST WITHIN THE STATE OF LOUISIANA

A. Conflicts Among the Highest Courts of the Several States.

The first judicial resolution of this particular issue, i.e., the attempted imposition of a use tax upon the value of natural gas consumed as interstate compressor fuel, was passed upon by the Supreme Court of Tennessee. *Texas Gas Transmission Corp. v. Benson, supra,* note 9, involved both a factual situation and a state taxing statute essentially identical to those at issue here. In that case, the Tennessee Supreme Court stated:

> The undisputed proof is the fuel gas does not come to rest after it leaves the mains and enters the compressor engines. It is in a continuous flow and never stops moving until consumed by the engines.
>
> Thus, the fuel gas does not come to rest in this State nor does it become a part of the mass of property within this State. It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in interstate commerce. *It is, therefore, a necessary and integral part of the interstate operation.*
>
> The fuel gas being one of the means by which the commerce is carried on, it is exempted from the use tax under the statute.

I. ARKANSAS CANNOT IMPOSE ITS SALES TAX DIRECTLY UPON AN ARTICLE WHILE IN THE FLOW OF INTERSTATE COMMERCE, WHEN THAT ARTICLE IS CONSUMED WHILE STILL IN THE FLOW OF INTERSTATE COMMERCE, BEFORE IT COMES TO REST WITHIN THE STATE OF ARKANSAS; *HELSON & RANDOLPH v. KENTUCKY.*

A. Conflicts Among the Supreme Courts of the Several States.

The first judicial resolution of this particular issue, *i.e.*, the attempted imposition of a use tax upon the value of natural gas consumed as interstate compressor fuel, was passed upon by the Supreme Court of Tennessee. In *Texas Gas Transmission Corp. v. Benson, supra,* note 6, the Tennessee Supreme Court pronounced:

> The undisputed proof is the fuel gas does not come to rest after it leaves the mains and enters the compressor engines. It is in a continuous flow and never stops moving until consumed by the engines.
>
> Thus, the fuel gas does not come to rest in this State nor does it become a part of the mass of property within this State. It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in interstate commerce. It is, therefore, a necessary and integral part of the interstate operation.
>
> The fuel gas being one of the means by which the commerce is carried on, it is exempted from the use tax under the statute.

> *Moreover, we agree with the Chancellor the case of Helson v. Commonwealth of Kentucky, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), is controlling.*

444 S.W.2d 137, 139 (emphasis added).

Thereafter, in 1975, the Michigan Court of Appeals addressed this same issue in *Michigan Wisconsin Pipe Line Co. v. State,* 227 N.W.2d 334 (Mich. App., Div. 2, 1975):

> It would appear that the tax on the natural gas here involved is of exactly the same nature as the tax sought to be imposed in *Helson,* supra. The gas was acquired outside the State of Michigan and that portion needed for propulsion after entering this state was transported along the claimant's pipeline for that purpose. There is no apparent distinction between the gas so carried and made available as propulsion fuel and the gasoline carried in the storage tanks of a ferry boat for exactly the same purpose. In either case, the tax is upon the instrument of commerce.

227 N.W.2d 334, 336.

The Michigan court went on to cite the *Texas Gas Transmission Corp. v. Benson* decision with approval and to hold that "the withdrawal of gas to be factually inseparable from the interstate transportation itself." 227 N.W.2d 334, 337.

> **Moreover, we agree with the Chancellor the case of *Helson v. Commonwealth of Kentucky,* 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929), is controlling.** (Emphasis supplied). 444 S.W.2d 137, 139.

Thereafter, in 1975, the Michigan Court of Appeals addressed this same issue in *Michigan Wisconsin Pipe Line Co. v. State,* 227 N.W.2d 334 (Mich. App. Div. 2, 1975), holding, in a final decision of the courts of that state, that:

> It would appear that the tax on the natural gas here involved is of exactly the same nature as the tax sought to be imposed in *Helson, supra.* The gas was acquired outside the State of Michigan and that portion needed for propulsion after entering this state was transported along the claimant's pipeline for that purpose. There is no apparent distinction between the gas so carried and made available as propulsion fuel and the gasoline carried in the storage tanks of a ferry boat for exactly the same purpose. In either case, the tax is upon the instrument of commerce. 227 N.W.2d 334, 336.

This Michigan court went on to cite the *Texas Gas Transmission Corp. v. Benson* decision with approval and to hold that "the withdrawal of gas to be factually inseparable from the interstate transportation itself." 227 N.W.2d 334, 337.

In 1978, one year after this Court's decision in *Complete Auto Transit, Inc. v. Brady, supra,* the Supreme Court of Wisconsin reached a similar conclusion in *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue, supra,* note 8. In that case, the court largely followed *Helson, Texas Gas* and *Michigan Wisconsin Pipe Line Company.* It concluded that the consumption of the compressor gas is an integral part of the process of interstate commerce and it went on to find that the consumption did not have a substantial nexus with the imposing state even under the *Complete Auto Transit* decision. This Court denied certiorari.

Thus, the decision of the Supreme Court of Louisiana in these proceedings, as well as the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, are indirect, irreconcilable conflict with the foregoing decisions of the Supreme Courts of Tennessee and Wisconsin and the appellate court of Michigan on this important federal question involving the state taxation of interstate commerce.

In 1978, the Supreme Court of Wisconsin reached a similar decision in *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue, supra,* note 5. In that case, the court largely followed *Helson, Texas Gas* and *Michigan Wisconsin Pipe Line Company.* However, the *Midwestern Gas* case was decided after this Court's decision in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977). It concluded that the consumption of the compressor gas is an integral part of the process of interstate commerce and it went on to find that the consumption did not have a substantial nexus with the imposing state even under the *Complete Auto Transit* decision. The application for certiorari with respect to the decision in *Midwestern Gas* was denied by this Court.

Thus, the decision of the Supreme Court of Arkansas in these proceedings, as well as the decisions of the Supreme Courts of Mississippi and Utah, are in direct, irreconcilable conflict with the above referenced decisions of the Supreme Courts of Tennessee and Wisconsin on this important federal question involving the state taxation of interstate commerce.

B. *Helson* Remains the Controlling Authority.

In *Helson,* Kentucky was attempting to impose a use tax upon the value of fuel which was purchased in Illinois to power a ferry boat engaged in interstate commerce, but where 75% of the fuel purchased in Illinois was actually consumed within the border of the State of Kentucky. This Court held that Kentucky's attempt to tax the value of the fuel consumed in that state to propel the ferry boat in interstate commerce was prohibited by the Commerce Clause because the fuel was as much an instrumentality of interstate commerce as the boat itself. The Court specifically held:

> [I]s not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is a little more than repetitious to say that such a tax cannot be laid upon *the use of a medium by which such transportation is effected.*

279 U.S. 245, 252; 49 S. Ct. 279, 281; 73 L. Ed. 683, 687.

B. *Helson* Remains the Controlling Authority.

In *Helson,* Kentucky was attempting to impose a use tax upon the value of fuel which was purchased in Illinois to power a ferry boat engaged in interstate commerce, but where 75% of the fuel purchased in Illinois was actually consumed within the borders of the State of Kentucky. This Court held that Kentucky's attempt to tax the value of the fuel consumed to propel the ferry boat in interstate commerce was prohibited by the Commerce Clause because the fuel was as much an instrumentality of interstate commerce as the boat itself. The Court specifically held:

> [I]s not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetitious to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 279 U.S. 245, 252; 73 L.Ed. 683, 687.

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The undisputed facts established in this case are even stronger for the legal proposition advanced by Columbia Gulf here, than were the facts in *Helson*. Here, the compressor fuel is an indistinguishable part of the continuously moving, commingled stream of natural gas in question – the very "cargo" being transported in interstate commerce. The use tax which Louisiana seeks to impose in this case is being imposed not only on the *instrumentalities* of interstate commerce such as fuel, but directly upon the value of a part of the commodity – the compressor fuel – which itself is being transported in interstate commerce.

More recently, in *Commonwealth Edison, supra* at 12, this Court addressed the impact of *Complete Auto Transit* on the Commerce Clause's prohibition regarding transactions that were purely local or intrastate in character. In that decision, which cited *Helson*, this Court at least tacitly indicated the continued validity of *Helson*:

> In this regard, the Montana court relied on this Court's decision in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83, 67 L. Ed. 237, (1922), *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S. Ct. 526, 67 L. Ed. 929 (1923), and *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S. Ct. 639, 71 L. Ed. 1049 (1927), which employed similar reasoning in upholding state severance taxes against Commerce Clause challenges.

The undisputed facts established in this case are even stronger for the legal proposition advocated by Arkla than were the facts in *Helson*. Here, the natural gas in question is itself the "cargo" being transported in interstate commerce, not just the fuel for the ferry boat, *i.e.*, the instrumentality of interstate commerce. The sales tax which Arkansas seeks to impose in this case is not being imposed just on the instrumentalities of interstate commerce and its fuel, but here the sales tax is imposed directly upon the value of the commodity being transported in interstate commerce itself, before such commodity ever passes through the meters at the "city gates" of the Company's distribution systems. Only after such metering, is this natural gas removed from the flow of interstate commerce, and therefore becomes a part of the mass of property within that state, subject to regulation by the APSC.

In *Commonwealth Edison*, the Court addressed the impact of *Complete Auto Transit* on the Commerce Clause's prohibition regarding transactions that were purely local or of intrastate type activity. In that decision, which cited *Helson*, this Court clearly indicated that *Helson* was not incorrectly decided. Specifically, this Court stated:

> In this regard, the Montana court relied on this Court's decision in *Heisler v. Thomas Colliery Co.*, 260 US 245, 67 L Ed 237, 43 S Ct 83 (1922), *Oliver Iron Mining Co. v Lord*, 262 US 172, 67 L Ed 929, 43 S Ct 526 (1923), and *Hope Natural Gas Co. v. Hall*, 274 US 284, 71 L Ed 1049, 47 S Ct 639 (1927), which employed similar reasoning in upholding state severance taxes against Commerce Clause challenges.

* * *

> We agree that *Heisler's* reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce. See, e.g., *Helson & Randolph v. Kentucky*, 279 U.S. 245, 250-252, 49 S. Ct. 279, 280-81, 73 L. Ed. 683 (1929); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 562, 45 S. Ct. 184, 185, 69 L. Ed. 439 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power. [Footnote omitted.]
>
> The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity.
>
> * * *
>
> We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved.

453 U.S. 609, 614-15 and 617; 101 S. Ct. 2946, 2951-2953; 69 L. Ed. 2d 884, 892 and 894. But the Court made clear in a following footnote: *

* * *

> We agree that *Heisler's* reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce. See, e.g., ***Helson & Randolph v Kentucky,*** 279 US 245, 250-252, 73 L Ed 783, 49 S Ct 279 (1929); *Ozark Pipe Line Corp. v Monier,* 266 US 555, 562, 69 L Ed 439, 45 S Ct 184 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power. [Footnote omitted.]
>
> The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attached only to a 'local' or intrastate activity.
>
> * * *
>
> We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved. (Emphasis supplied.) 453 U.S. 609, 614-15 and 617; 69 L.Ed.2d 884, 892 and 894.

This final statement of the Court is followed by a reference to footnote 7, in which this Court expressly provided:

> **This is not to suggest, however, that *Heisler* and its progeny** [which as referenced by the Court included *Helson*] **were wrongly decided.**

(emphasis supplied.) 453 U.S. 609, 617; 101 S. Ct. 2946, 2953; 69 L. Ed. 2d 884, 894, footnote 7.

In 1973, shortly before *Complete Auto Transit* was decided, this Court, in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 93 S. Ct. 1186, 35 L. Ed. 2d 545 (1973), noted the continuing validity of the *Helson* rationale:

> We hold that *Edelman [v. Boeing Air Transport, Inc.*, 283 U.S. 249, 53 S. Ct. 591, 7 L. Ed. 1155 (1933)] and *Nashville [Chattanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1993)] support the conclusion of the Supreme Court of Illinois that this tax, as applied to all fuel withdrawn from storage for consumption in an interstate vehicle, does not place an unconstitutional burden on interstate commerce. Further, we decline to hold that *Edelman* has outlived its usefulness. [Footnote omitted.] We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult. This Court has established some precedents, however, and *Edelman* and *Nashville* remain useful guidelines.

> **This is not to suggest, however, that *Heisler* and its progeny** [which as referenced by the Court included *Helson*] **were wrongly decided.**

(Emphasis supplied.) 453 U.S. 609, 617; 69 L.Ed.2d 884, 894, footnote 7.

In 1973, shortly before *Complete Auto Transit* was decided, this Court, in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 35 L.Ed.2d 545, 93 S.Ct. 1186 (1973), noted the continuing validity of the *Helson* rationale. In *United Air Lines* this Court stated:

> We hold that *Edelman* and *Nashville* support the conclusion of the Supreme Court of Illinois that this tax, as applied to all fuel withdrawn from storage for consumption in an interstate vehicle, does not place an unconstitutional burden on interstate commerce. Further, we decline to hold that *Edelman* has outlived its usefulness. [Footnote omitted.] We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult. This Court has established some precedents, however, and *Edelman* and *Nashville* remain useful guidelines.

> The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it is transported, under *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583 (1954), nor by the State in which it is merely consumed, under *Helson*. (Emphasis supplied.) 410 U.S. 623, 629-30; 93 S. Ct. 1186, 35 L. Ed. 2d 545, 552-53.

Again, in *Commonwealth Edison*, decided in 1981, several years after *Complete Auto Transit*, this Court reiterated that *Helson* was not wrongly decided, clearly implying that *Helson* remains the law of the land with respect to the imposition of a sales or use tax directly upon the value of the fuel consumed to power an instrumentality of interstate commerce.

> The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. **Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it was transported, under *Michigan-Wisconsin Pipe Line Co. v Calvert*, 347 US 157, 98 L Ed 583, 74 S Ct 396 (1954), nor by the State in which it is merely consumed, under *Helson*.** (Emphasis supplied.) 410 U.S. 623, 629-30; 35 L.Ed.2d 545, 552-53.

Again, in *Commonwealth Edison*, decided in 1981, several years after *Complete Auto Transit*, this Court reiterated that *Helson* was not wrongly decided, clearly implying that *Helson* remains the law of the land with respect to the imposition of a sales or use tax directly upon the value of the fuel consumed to power an instrumentality of interstate commerce.

The Supreme Court of Louisiana ignored *Helson*, and treated that precedent as if it did not exist. Thus, under the decision of the Supreme Court of Louisiana, the value of the fuel for boats, airlines, trains, cars, buses, trucks or anything else consumed within the borders of Louisiana, but while within the confines of interstate commerce, may be directly subjected to Louisiana's use tax, subject only to the limitations announced by this Court in *Complete Auto Transit.*

From this Court's decisions there have evolved certain restrictions (and liberties) on the states' powers to impose their taxes upon entities engaged in interstate commerce. Although this Court's decision in *Complete Auto Transit* (1977) did away with the rule announced in *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951) – that no direct tax could be imposed upon interstate commerce or the privilege of doing interstate business – Columbia Gulf submits that both *Spector* and *Complete Auto Transit* addressed indirect taxes on the privilege of doing interstate business. While there has certainly been an expansion of the concept announced in *Complete Auto Transit,* and this Court has consistently held that interstate commerce may be obliged to bear its fair share of the cost of services provided by the state governments, this Court has **never** permitted a direct excise tax to be imposed upon the value of a portion of a commodity during its interstate journey, with which it is indistinguishably commingled and from which it is extracted solely for the purpose of propelling the commodity.

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The Arkansas Supreme Court totally ignored this Court's "bright-line" rule announced in *Helson* and treated that precedent as if it did not exist. For this Court to ignore this denigration of the principle of *stare decisis* by this state supreme court will leave the door completely open for all states to seek to tax all fuels consumed within the confines of interstate commerce, but within that state, to power the instrumentalities of interstate commerce. Thus, under the Arkansas Supreme Court's decision here, the value of the fuel of boats, airlines, trains, cars, buses, trucks or anything else consumed within the borders of Arkansas, but while within the confines of interstate commerce, may be directly subjected to Arkansas' sales tax, subject only to the limitations announced by this Court in *Complete Auto Transit.*

This Court's decisions have formed an evolution of the Commerce Clause restrictions on the states' powers to impose their taxes upon entities engaged in interstate commerce. However, Petitioner specifically notes that, while this Court overruled the case of *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 95 L.Ed. 573, 71 S. Ct. 508 (1951), and the holding of that case that no direct tax could be imposed upon interstate commerce or the privilege of doing business in interstate commerce, the rule of *Spector,* and the case which overruled and modified it, *Complete Auto Transit, Inc. v. Brady,* were addressing indirect taxes on the privilege of doing business in interstate commerce. While there has certainly been an expansion of the concept announced in *Complete Auto Transit,* and this Court has consistently held that interstate commerce may be obliged to bear its fair share of the cost of services provided by the state governments, this Court has **never** permitted a direct excise tax to be imposed upon the value of the commodity which is itself being transported in interstate commerce.

Both *Spector* and *Complete Auto Transit* involved taxes on the privilege of doing business. *Complete Auto Transit*, from which the modern four-prong test has evolved, involved a franchise tax for the privilege of doing business in Mississippi, determined upon the gross sales or gross income derived from the activity within the State of Mississippi. The taxpayer, in the business of transporting motor vehicles from the General Motors assembly plants located outside of Mississippi to dealers in Mississippi, was assessed a Mississippi franchise tax based upon the gross receipts from the sale of services in the State of Mississippi. The tax in *Complete Auto Transit* was not a tax on the **value** of the vehicles being moved in interstate commerce; rather, it was a tax based on the income derived by the carrier from transportation services actually provided within the State of Mississippi. In that decision, this Court established what has become known as the four-prong test to determine the validity of a state tax affecting interstate commerce:

1 – The activity must be sufficiently connected to the state to justify the tax (the *nexus* requirement).

2 – The tax must be *fairly related* to benefits provided by the state to the taxpayer.

3 – The tax must not *discriminate* against interstate commerce.

4 – The tax must be *fairly apportioned.*

[The first paragraph on page 18 discusses the cases of *D.H. Holmes Co., Ltd. v. McNamara,* 486 U.S. 24 (1988) and *Oklahoma Tax Commission v. Jefferson Lines, Inc.,* ___ U.S. ___, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)]

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Both *Spector* and *Complete Auto Transit* involved taxes on the privilege of doing business. *Complete Auto Transit,* from which the modern four-prong test has evolved, involved a franchise tax for the privilege of doing business in Mississippi which tax was determined based upon the gross sales or gross income derived from the activity within the State of Mississippi. Complete Auto Transit was in the business of transporting motor vehicles from the General Motors assembly plants located outside of Mississippi to dealers in Mississippi. Complete Auto Transit was assessed a Mississippi franchise tax based upon the gross receipts from the sale of services in the State of Mississippi. The tax in *Complete Auto Transit* was not a tax upon the **value** of the vehicles being moved in interstate commerce, rather it was a tax based upon the income derived by the carrier from transportation services actually provided within the State of Mississippi. In that decision, this Court established what has become known as the four-prong test of *Complete Auto Transit,* noting, that to avoid conflict with the Commerce Clause, the challenge tax (1) must have a sufficient nexus with the state imposing the tax, (2) must be fairly apportioned, (3) must not discriminate against interstate commerce, and (4) must be reasonably related to the services provided by the taxing state.

* * *

Thus, in each of the cases where a direct excise tax, a sales tax, a use tax or a severance tax was at issue, the goods and products being subjected to the state excise tax had, in fact, come to rest within the state and become a part of the mass of the property of the taxing state, either before the interstate transportation began or after the products were removed from interstate commerce. This Court has never authorized the direct imposition of an unapportioned excise tax upon the value of the goods and products actually being transported in interstate commerce, while those articles remain in the stream of interstate commerce.

This is the issue presented here. As was the situation in *Midwestern Gas, Texas Gas,* and *Michigan Wisconsin Pipe Line v. State,* the facts are undisputed that the natural gas which Louisiana seeks to tax in these proceedings never was removed from interstate commerce and never came to rest within the State of Louisiana before it was consumed as fuel for the interstate compressors – totally within the confines of the interstate pipeline system and in furtherance of the interstate journey.

Thus, in each of the cases where a direct excise tax, a sales tax, a use tax or a severance tax was at issue, the goods and products being subjected to the state excise tax had, in fact, come to rest within the state and become a part of the mass of the property of the taxing state, either before the interstate transportation began or after the products were removed from interstate commerce. This Court has **never** authorized the direct imposition of an unapportioned excise tax upon the **value** of the goods and products actually being transported in interstate commerce, while those articles remain in the stream of interstate commerce.

This is the issue presented here. As was the situation in *Midwestern Gas, Texas Gas,* and *Michigan Wisconsin Pipeline,* the facts are undisputed that the natural gas at issue in these proceedings never was removed from interstate commerce and never came to rest within the State of Arkansas before it was consumed as fuel for the interstate compressors. This gas was consumed totally within the confines of the interstate pipeline system.

* * *

C. Summary.

Louisiana recognizes that its taxing power does not extend to "bona fide interstate commerce". La.R.S. 47:305(E)(1). However, if the compressor fuel at issue here can be taxed, then airline fuel consumed by planes passing over the several states can be taxed by those states, diesel fuel burned by the trains and trucks passing through Louisiana or any other state and by boats moving barges on navigable streams in Louisiana or any other state can likewise be taxed.

C. Summary.

The Court's denial of this writ application will open the floodgate of taxing activities by the states on the value of products being transported in interstate commerce. If the natural gas at issue in this case can be taxed, then the airline fuel consumed by planes passing over the several states can be taxed by those states, the diesel fuel burned by the trains passing through Arkansas and by the boats moving barges on navigable streams in Arkansas can likewise be taxed.